United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1623

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- RAEFAEL NAVEDO, Appellant.	Docket No. 74-1623

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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-against-

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I

The Government, on appeal, contends that the denial of the proffered plea of guilty to the conspiracy charge (count one) was a reasonable exercise of discretion for the reason stated by the District Court on January 25, 1974 (when the plea was rejected), i.e., that there was insufficient proof offered by appellant upon the plea colloquoy to establish that another person shared appellant's belief that the substance involved in the crime was cocaine (Government's Brief at 10-11).

The Government's position on appeal is a sharp contrast to its position in the District Court. The Assistant United

States Attorney in charge of the case submitted a Memorandum of Law* to the District Court urging acceptance of the proffered plea of guilty, and made the unqualified representation at the plea colloquoy that the Government was able to establish a prima facie case against appellant on the conspiracy charge (Transcript of December 11, 1973, at 8). In addition, the Government called to the District Court's attention appellant's pre-arraignment confession admitting dealing in cocaine (Transcript of December 11, 1973 at 8).

The Government quotes extensively from the record at pages 7 and 8 of its brief. As this quote reflects, appellant readily admitted his full involvement in the conspiracy to distribute cocaine as to the April 5 and April 17 transactions (Transcript of December 11, 1973, at 10-13). In quoting these portions of the colloquy however the Government omits the next question and answer:

> THE COURT: All right. It has been represented to me by the Government that the substance was believed by this defendant to be cocaine, and that he knowingly and willfully assisted the other person, who I take it is Roy, in delivering this cocaine. Is that so?
>
> THE DEFENDANT: Yes
>
> (Transcript of December 11, 1973, at 13).

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*The Government Memorandum of Law is annexed as "D" to the appendix to appellant's main brief.

The Government, on appeal, suggests that appellant's responses at the plea colloquy were less than adequate (Government's Brief at 9). Yet the responses quoted by the Government and the omitted question and answer quoted above make it clear that appellant fully acknowledged his guilty role in the conspiracy, and answered all questions put to him by the Court in a manner consistent with this acknowledgment. Appellant never protested his innocence of the charge.

Despite these uncontradicted facts, the Government bases its position on appeal on cases wherein the accused at the plea colloquy protested his innocence of the charges. United States ex rel. Dunn v. Cassacles, 494 F.2d 397 (2d Cir. 1974); United States v. Melendrez-Salas, 466 F.2d 861 (9th Cir. 1972); United States v. Bednarski, 445 F.2d 364 (5th Cir. 1971); Maxwell v. United States, 368 F.2d 735 (9th Cir. 1966). These cases are irrelevant here.

II

The Government attempts to reject Point II of Appellant's Brief primarily on the ground that it is without support in the record (Government's Brief at 14 and 15). This is not so. The record reflects that Sergeant Rawald and Detective Murphy were the only witnesses to testify concerning the events of the alleged assault on April 17.

Sgt. Rawald, testified on direct that:

> A. I observed the pickup truck double park in front of 1581 Fulton Avenue. The car I was riding in then stopped behind the pickup truck. I told the officers who were with me that we would at this time effect the arrest of Mr. Navedo and the other person in the truck. I observed Mr. Navedo and the unknown male start to exit the truck. As they exited the truck I exited the vehicle I was in and proceeded towards the truck. As I was approximately ten, twelve foot from Mr. Navedo, he looked in my direction and then jumped back into the truck. I ran up to the side of the truck, and I said, "Stop, police."
>
> Q. Did you have your gun out at this time?
>
> A. Yes I did, sir.
>
> Q. How far from you, when you [sic] "Stop police," how far from the truck were you?
>
> A. At that time I was approximately three, four foot, from the side of the truck.
>
> Q. What happened at that point?
>
> A. As I got to the side of the truck I observed Mr. Navedo pointing a gun out the window of the truck in my direction. I then fired one shot at the truck, at Mr. Navedo. Then Mr. Navedo dropped the gun that he had pointed out the window, and fell over onto the driver of the truck. The driver at this time was accelerating the truck and attempting to pull away.
>
> (Emphasis added)
> pp. J03-104.

Detective Murphy's account of the incident is as follows:

> A. Well, we had our high beams on the rear of the truck, so as to avoid Navedo and his friend seeing who was getting out of the surveillance car. As we approached Navedo, Sergeant Rawald and myself, I saw Navedo look in our direction, immediately jump back into the truck, and I heard the truck start up again.
>
> Q. Where was Sergeant Rawald then?
>
> Q. Sergeant Rawald was running toward the front of the truck on the passenger side, and I saw an arm extend out from the passenger side holding a gun. I saw Sergeant Rawald yell "Halt, police," a few times, and then he fired a shot at the truck as it was moving.
>
> (Emphasis added.)
> (Tr. 128)

The record reflects that when the undercover vehicle pulled up behind the truck in which appellant was a passenger the police deliberately turned on their high beams so that appellant could not tell who they were (102-105). This, coupled with Rawald's testimony that he (Rawald) was three to four feet from the side of the truck identifying himself as a police officer when he observed the appellant with a gun in his hand, support appellant's contention that the Government failed to prove that appellant assaulted Rawald

with knowledge that he was a law enforcement agent.* Detective Murphy's** testimony, quoted above, makes this point even clearer.

The Government's suggestion that this Circuit in United States v. Ulan, 421 F.2d 787 (2d Cir. 1970) rejected the McKensie analysis that knowledge is an essential element of the charge is refuted by this Court's most recent reference to McKensie in United States v. Alsondo, 456 F.2d 1339 (2d Cir. 1973), cert. granted sub nom United States v. Feola, 42 U.S.L.W. 3584 (April 16, 1974).

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*The Government's remarks on summation add further support to appellant's contention that the "assault" occurred before Sgt. Rawald identified himself as a police officer:

> He [Sgt. Rawald] gets out of the car, appraoches Navedo, Navedo sees him, because that is the way he is standing, jumps back in the truck, the truck starts, he [Sgt. Rawald] runs alongside, points his revolver, and he says "Stop, police." Navedo at this time has a loaded 45 pointed at Sergeant Rawald. Rawald yells "Stop, police," fires a revolver.
>
> (Emphasis added.)
> (223)

**The Government's contention that Murphy was not present at the sale on April 5th is contradicted by Rodriguez' testimony that he was accompanied by Det. Murphy and the informant when he arrived at the apartment on the date of the sale (24). No testimony of Rodriguez, Murphy or any other Government witness reflects that Murphy left the room before the sale occurred.

However, assuming arguendo the Government's claim that Murphy was not present and could not have been recognized by appellant on April 17th, this does not diminish the validity or force of appellant's argument, since the Government failed to establish that appellant knew that Rawald and Murphy were law enforcement officers, and the District Court failed to so charge.

> Where there is a failure to charge an essential element of the offense, the error almost invariably affects "substantial rights" within the meaning of the rule. See United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972); United States v. Massiah, 307 F.2d 62, 70-71 (2d Cir. 1962) (Hayes, J., concurring), rev'd on other grounds, 377 U.S. 201 (1964). And we note that improper jury charges under section 111 (particularly relating to element of scienter) have been a fertile source for judicial willingness to invoke the "plain error" rule. E.g., United States v. McKenzie, 409 F.2d 983, 985-86 (2d Cir. 1969) (dictum); see United States v. Young, 464 F.2d 160, 164 (5th Cir. 1972); cf. United States v. Rybicki, 403 F.2d 599, 602 (6th Cir. 1968) (indictment charged obstruction, by threat of force, of IRS agents engaged in performance of their duties in violation of 26 U.S.C. §7212 (a)).
>
> Id. at 1344.

III

The Government claims that appellant's argument in Point III is without merit because "[t]here is nothing in the record to suggest that Navedo did not understand his Miranda warnings when they were read to him," and because "the record establishes that at his post-arrest interview his English was adequate" (Government's Brief at 16). The Government can not dispute the fact that it failed to provide appellant with a Spanish interpreter at the pre-arraign-

ment interview. The record on appellant's tendered plea of guilty to count one, reflects that appellant has had no schooling whatsoever and can neither read nor write (Transcript of December 11, 1973 at 3). Moreover, despite the fact that appellant was provided a Spanish interpreter at the plea colloquy (Transcript of December 11, 1973 at 2) several of his responses reflect a total lack of understanding:

> THE COURT: Have you been induced to plead guilty by reason of any fear or pressure or force or the like?
>
> THE DEFENDANT: Some people did that on the street. Some didn't.
>
> THE COURT: What did they do on the street?
>
> THE DEFENDANT: They asked me, you know maybe I'd go to jail.
>
> THE COURT: Well the question is this. Whether any person has put pressure on you to make you plead guilty instead of going to trial.
>
> THE DEFENDANT: No.
>
> (Transcript of December 11, 1973 at 7-8).
>
> THE COURT: Have you told your attorney everything you know about this matter?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Have you held anything back from him?
>
> THE DEFENDANT: Everything.

THE COURT: Have you held anything back from him is the question.

THE DEFENDANT: No.

(Transcript of December 11, 1973 at 5).

The above responses, in Court, rendered through a Spanish interpreter, after having had the benefit of counsel are further proof of appellant's inability to understand his Miranda advises, which the Government claims he fully understood and intelligently waived in the offices of the United States Attorney, without an interpreter, and without the aid of counsel.

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief, the case should be reversed and remanded to the District Court for a new trial, or alternatively, remanded to the District Court for re-sentence with instructions to set aside the jury verdict of guilty and impose sentence upon an adjudication of guilt based on acceptance of appellant's plea of guilty to count one.

Respectfully submitted,

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